(10)

No. 96-792

In the Supreme Court of the United States

OCTOBER TERM, 1996

LYNNE KALINA, PETITIONER

v.

RODNEY FLETCHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
PATRICIA A. MILLETT
Assistant to the Solicitor General
BARBARA L. HERWIG
PETER R. MAIER
Attorneys
Department of Justice
Washington, D. C. 20530-0001
(202) 514-2217

35 pp

QUESTION PRESENTED

Whether a prosecutor is entitled to absolute immunity from suit for requesting the issuance of an arrest warrant in conjunction with the filing of a criminal information against an individual.

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INTEREST OF THE UNITED STATES

The United States employs approximately 4500 prosecuting attorneys, who file criminal charges in approximately 38,000 cases annually. United States Dep't of Justice, *United States Attorneys Annual Statistical Report: Fiscal Year 1996*, at 1, 70 (Table 3). The United States thus has a substantial interest in questions of prosecutorial immunity. Although federal officers are not subject to suit under 42 U.S.C. 1983, they may be sued on an implied right of action for violations of constitutional rights. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The immunity granted to federal officers in *Bivens* actions generally parallels the immunity that state officers enjoy in suits under 42 U.S.C. 1983. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457

U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). Thus, the disposition of the immunity issue in this case could significantly affect federal prosecutors sued for damages as a result of actions taken in the performance of their official duties.

STATEMENT

1. In Washington, criminal prosecutions are initiated either by grand jury indictment or the filing of an information. Wash. Rev. Code § 10.37.010 (1996); Wash. Crim. R. 2.1(a) (1994). The majority of felony cases are commenced through the filing of an information. Pet. 4.

To initiate criminal charges by information, the prosecutor typically files a set of three documents with the court. The first document is the information, which is a "plain, concise and definite written statement of the essential facts constituting the offense charged," and is signed by the prosecutor. Wash. Crim. R. 2.1(a)(1). The second filing is a Certification for Determination of Probable Cause. That statement sets forth the facts supporting a determination that there is probable cause to charge and arrest an individual for the crime alleged in the information. It apparently is common practice for the certification to be signed, under oath, by the prosecutor. See Pet. 4; Br. in Opp. 12 n.6. The third document submitted to the court is a motion requesting that the court (i) find probable cause, (ii) issue an arrest warrant, and (iii) fix bail or release the individual on personal recognizance. J.A. 12.

2. Petitioner Lynne Kalina is a deputy prosecutor for the King County Prosecuting Attorney in the State of Washington.[1] In December 1992, petitioner filed a criminal information in King County Superior Court charging

[1] We accept as true, for present purposes, the relevant factual allegations contained in respondent's complaint.

respondent Rodney Fletcher with second-degree burglary, based on an alleged theft of computer equipment from Our Lady of Guadalupe School. Along with the information, petitioner filed a certification for determination of probable cause, the police department's suspect information report, and a motion for a determination of probable cause, issuance of an arrest warrant, and the establishment of bail. Pet. App. 2a; J.A. 13-20; see also J.A. 11-12 (affidavit of petitioner describing preparation of documents). The certification for determination of probable cause recited that petitioner was familiar with the police report and investigation conducted by the Seattle Police Department, and it set forth facts, apparently based on the police report and investigation, on which the motion for determination of probable cause was based. J.A. 19-20.

The Superior Court granted the motion and issued an arrest warrant for respondent. Respondent was arrested and detained on September 24, 1993. Subsequently, on October 26, 1993, the charges were dismissed on motion of the prosecuting attorney, apparently when she discovered that some of the information on which the charges were based was erroneous. Pet. App. 2a; J.A. 6.

3. Following dismissal of the charges against him, respondent filed suit under 42 U.S.C. 1983 alleging that the probable cause certification contained information that petitioner knew or should have known was false. J.A. 5. The complaint sought damages for the erroneous arrest. J.A. 6.

Petitioner moved for summary judgment on the ground of absolute prosecutorial immunity. The district court rejected the motion in a minute order. Pet. App. 8a. The court of appeals affirmed, holding that petitioner's actions in procuring the arrest warrant were protected only by qualified immunity. *Id.* at 5a-7a. The court relied on this Court's decision in *Malley* v. *Briggs*, 475 U.S. 335 (1986),

which held that police officers do not enjoy absolute immunity when they apply to a court for an arrest warrant Pet. App. 5a-7a.

SUMMARY OF ARGUMENT

Absolute immunity should attach when a prosecutor seeks an arrest warrant in conjunction with the filing of criminal charges against an individual. This Court has applied a functional approach to immunity questions, which focuses on the nature of the function performed by an official and its relationship to the judicial or other governmental process. Prosecutorial activities that are advocatory, closely related to the judicial process, and preliminary to the initiation of a prosecution, such as participation in a probable-cause hearing, have been held to warrant absolute immunity.

When seeking an arrest warrant predicated on the filing of charges against an individual, a prosecutor is acting in her role as an advocate for the government before a neutral decisionmaker. Her appearance reflects a considered legal judgment on the part of the government that an individual should be charged with a crime and brought before a court, and that terms should be set to ensure his presence pending adjudication of the criminal matter. The prosecutor's role in filing such papers with the court is neither administrative nor investigative. The filing of charges and a request for an arrest warrant mark the onset of a judicial process, as evidenced by the triggering of speedy trial provisions and the establishment of the terms of bail. Indeed, the request for an arrest warrant in these circumstances is the functional equivalent of a prosecutor's participation in a probable-cause hearing, which this Court has held warrants absolute immunity.

A grant of absolute immunity to a prosecutor's request for an arrest warrant in conjunction with the filing of criminal charges would be consistent with common law history, which generally immunized such conduct from suit. A denial of immunity, moreover, would permit plaintiffs to circumvent the prosecutor's immunity from malicious prosecution suits by challenging the arrest that ushered in the prosecution. Because the criminal process provides ample alternative checks on prosecutorial error, absolute immunity is appropriate.

Finally, petitioner's signing of the certification in support of probable cause does not strip her of absolute immunity. Petitioner did not purport to attest to facts as a percipient witness. Her certification was functionally comparable to a proffer of evidence, relaying what the police investigators would, if called as witnesses, state in court. Petitioner filed the certification, moreover, as part of a package of documents that formally initiated the prosecution against respondent. Plaintiffs should not be able to circumvent the absolute immunity attaching to that conduct by dissecting the process paper by paper.

ARGUMENT

PROSECUTORS ARE ABSOLUTELY IMMUNE FROM SUIT FOR DAMAGES FOR SEEKING AN ARREST WARRANT IN CONJUNCTION WITH THE FILING OF CRIMINAL CHARGES AGAINST AN INDIVIDUAL

A. Introduction

In determining whether a prosecutor is entitled to absolute immunity from suit under 42 U.S.C. 1983 when engaging in particular conduct, the assessment of the function of that conduct in the criminal process presents a question of federal law. *Imbler* v. *Pachtman*, 424 U.S. 409, 417-418 (1976) (inquiry focuses on congressional intent); *Hampton* v. *City of Chicago*, 484 F.2d 602, 608 (7th Cir.

1973), cert. denied, 415 U.S. 917 (1974). Thus, while criminal procedures and practices vary somewhat from jurisdiction to jurisdiction, the ultimate question in each case must be whether the defendant was functioning in a capacity for which absolute immunity is appropriate under this Court's decisions and the common law traditions and policies on which prosecutorial immunity is based.

1. To place our submission in context, we note at the outset that federal practice departs from the Washington practice at issue in this case in two respects.

First, under Washington law, a felony prosecution may be instituted by the filing of an information. Wash. Crim. R. 2.1; Wash. Rev. Code § 10.37.010 (1996); see also *Beck* v. *Washington*, 369 U.S. 541, 545 (1962) ("Ever since *Hurtado* v. *California*, 110 U.S. 516 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions."). By contrast, unless waived by the defendant, the United States can initiate a felony prosecution only by indictment. U.S. Const. Amend. V; Fed. R. Crim. P. 7(a).[2] An indictment, "fair upon its face" and returned

[2] An arrest warrant may be issued on the basis of a complaint. See Fed. R. Crim. P. 4(a). Such an arrest, like a warrantless arrest that is permitted by the Fourth Amendment, see *United States* v. *Watson*, 423 U.S. 411 (1976), triggers statutory time limits for the defendant's indictment or the filing of an information. See 18 U.S.C. 3161(b). Until the individual is charged by indictment or information, however, no federal prosecution has commenced in the constitutional sense. Accordingly, in federal prosecutions, no Sixth Amendment right to counsel attaches until the individual is charged by indictment or information, even if he previously has been named in a complaint. See, *e.g.*, *United States* v. *Langley*, 848 F.2d 152, 153 (11th Cir.), cert. denied, 488 U.S. 897 (1988); cf. *United States* v. *Gouveia*, 467 U.S. 180, 187-189 (1984); *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975). In light of the requirements of the Fifth Amendment's Grand Jury Clause, it is not until the federal government has obtained an indictment (or its waiver) that the government may be

by a "properly constituted grand jury," conclusively determines the existence of probable cause and, in the federal sphere, requires issuance of an arrest warrant without further inquiry. *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975) (quoting *Ex parte United States*, 287 U.S. 241, 250 (1932)). Where a prosecution—federal or state—is initiated by information, however, an independent showing and determination of probable cause is necessary for the issuance of an arrest warrant or for the continued detention of an individual arrested without a warrant. U.S. Const. Amend. IV; *Gerstein*, 420 U.S. at 116 n.18, 120-122; see also Fed. R. Crim. P. 5.1 (a)-(b).

Second, federal prosecutors typically do not personally attest to the facts set forth in a complaint filed under Fed. R. Crim. P. 3 or in an affidavit filed in support of an application for an arrest warrant under Fed. R. Crim. P. 4(a).[3] Instead, a law enforcement agent ordinarily attests to those facts. Where an attorney for the government is involved, the attorney may sign or approve the complaint, which would reflect the attorney's conclusion that the facts, as recited by the law enforcement agent, give rise to probable cause to believe that the person named committed the offense and that the complaint should be filed and an arrest warrant issued. In doing so, however, the attorney for the government acts in her role as a legal representative of the United States and an officer of the court, just as when the attorney signs an indictment or information. Of course, the attorney for the government might draft the complaint or affidavit to be signed by the law enforcement agent in support of an arrest warrant, just as attorneys in

said to have "committed itself to prosecution." *Gouveia*, 467 U.S. at 189.

[3] The complaint "is a written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 3.

other contexts assist in drafting affidavits based on information furnished by and within the knowledge of the affiant. But in performing that function, too, the attorney for the government acts in her capacity as a lawyer, not a witness.[4]

2. Respondent's complaint (J.A. 4-7) and brief in opposition filed in this Court (at 7-28) focus on the narrow question of whether a prosecutor enjoys absolute immunity when she acts as a complaining witness. The question presented in the certiorari petition, however, is more broadly cast in terms of whether absolute immunity attaches when a prosecutor causes an arrest warrant to issue in conjunction with the filing of criminal charges against an individual. Pet. i. That formulation can be understood to include actions by a prosecutor in filing a motion for an arrest warrant based on the affidavit or certification of a police officer, rather than of the prosecutor herself.

The scope of the court of appeals' decision is unclear in the same respect. The court's opinion initially states the issue broadly. See Pet. App. 3a ("Whether a state prosecutor is entitled to absolute or qualified immunity for her actions in procuring an arrest warrant is an issue of first impression in this circuit."). Its rejection of the Sixth Circuit's decision in *Joseph* v. *Patterson*, 795 F.2d 549, 555 (1986), cert. denied, 481 U.S. 1023 (1987), likewise focuses on the seemingly broader issue of "whether seeking an arrest warrant merits absolute immunity." Pet. App. 7a.[5]

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[4] Similarly, in other contexts (such as bail hearings), federal prosecutors make proffers of evidence, including the facts to which witnesses, if called, would testify. See, *e.g.*, *United States* v. *Smith*, 79 F.3d 1208, 1209 (D.C. Cir. 1996). Such proffers, however, are representations by counsel, not statements by witnesses.

[5] In a similar vein, the court below relied for its holding on a statement by the Eighth Circuit in *Kohl* v. *Casson*, 5 F.3d 1141, 1146 (1993), that "the function of seeking an arrest warrant is subject only to qualified immunity." Pet. App. 5a-6a.

The court's actual holding or "[c]onclusion," however, is ambiguous: it states that petitioner is not entitled to immunity "for her actions in filing a declaration for an arrest warrant." *Ibid.* The wording of the opinion also raises concerns about whether absolute immunity would be denied to a prosecutor in connection with her preparation or drafting of an affidavit for signature by a law enforcement officer. *Id.* at 5a ("we hold that a prosecutor is not absolutely immune when *preparing* a declaration in support of an arrest warrant") (emphasis added); *id.* at 6a ("Kalina's actions in *writing*, signing and *filing* the declaration for an arrest warrant" do not enjoy immunity) (emphases added).

Because of the nature of federal practice and the wording of the opinion below, this brief first addresses whether absolute immunity attaches to a prosecutor's action generally in seeking an arrest warrant in conjunction with the filing of criminal charges. We also address the court of appeals' suggestion that absolute immunity does not include a lawyer's drafting and preparation of documents to be filed in court. Finally, we address respondent's narrower point that absolute immunity should be denied for the prosecutor's execution of the certification on the theory that she acted as a complaining witness.

B. Prosecutors Enjoy Absolute Immunity Both For The Initiation Of A Prosecution And For Advocatory Acts That Are Preparatory To The Initiation Of A Prosecution

Section 1983 creates a private cause of action against "[e]very person" who, under color of state law, deprives

another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. Although Section 1983's language is sweeping and does not expressly provide for immunities from suit, this Court has held that the statute "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler*, 424 U.S. at 418; see also *Briscoe* v. *LaHue*, 460 U.S. 325, 330-331 (1983). Immunities "well grounded in history and reason" thus will shield or limit the liability of Section 1983 defendants. *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951)). Whether a government official enjoys absolute or qualified immunity turns upon a functional analysis, which generally focuses on the "nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269; see also *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985).

1. Applying the functional approach, this Court held in *Imbler* that prosecutors enjoy absolute immunity in "initiating a prosecution and in presenting the State's case." 424 U.S. at 431. The common law had long immunized such conduct from tort suits, because "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424-425; see also *id.* at 427-428 (the threat of liability "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system").

Furthermore, a prosecutor must "inevitably make[] many decisions that could engender colorable claims of constitutional deprivation" and must do so "under serious constraints of time and even information." *Imbler*, 424 U.S. at 425. Consequently, prosecutors "would face

greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials." *Ibid.* At the same time, the Court recognized that absolute immunity would not leave prosecutorial abuses unchecked. "[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Id.* at 429; see also *ibid.* (noting that prosecutors are also subject to criminal prosecution, under 18 U.S.C. 242, for the intentional deprivation of constitutional rights).[6]

2. In *Burns* v. *Reed*, 500 U.S. 478 (1991), the Court recognized that a prosecutor's duties "as advocate for the State" are not limited to the initiation and prosecution of a criminal case, but also include "actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Id.* at 486 (quoting *Imbler*, 424 U.S. at 431 & n.33). The Court held that a prosecutor's participation in a probable-cause hearing and request for a search warrant during that hearing enjoyed absolute immunity. *Burns*, 500 U.S. at 487. The actions of appearing before a judge and presenting evidence in support of the motion for a search warrant "clearly involve[d] the prosecutor's 'role as advocate for the State,' rather than his role as 'administrator or investigative officer.'" *Id.* at 491 (quoting *Imbler*, 424 U.S. at 430-431 & n.33). Further, because the issuance of a search warrant "is unquestionably a judicial act," *Burns* reasoned that the prosecutor's "appear[ance] at a probable-cause hearing is 'intimately associated with

[6] The availability of internal disciplinary measures against a prosecutor also serves to deter and punish violations of constitutional rights. In the Department of Justice, for example, the Office of Professional Responsibility is charged with investigating allegations of professional misconduct by Department attorneys and recommending appropriate sanctions if violations are found. See 28 C.F.R. 0.39.

the judicial phase of the criminal process,'" and thus absolute immunity is necessary to protect the integrity of the judicial process. *Burns*, 500 U.S. at 492 (quoting *Imbler*, 424 U.S. at 430); see also 500 U.S. at 494 ("Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation.") (emphasis omitted). The recognition of absolute immunity also was consistent with common law precedent, which immunized prosecutors from suit for statements made in "any hearing before a tribunal which perform[ed] a judicial function." *Burns*, 500 U.S. at 490 (quoting W. Prosser, *Law of Torts* § 94, at 826-827 (1941)).

At the same time, *Burns* declined to extend absolute immunity to a prosecutor's rendering of legal advice to police in connection with their investigation. The Court held that such conduct was too far removed from the judicial process to merit heightened protection. *Burns*, 500 U.S. at 494-496. The opinion also relied upon the absence of a common law predicate for that claim of absolute immunity. *Burns*, 500 U.S. at 492-493.

3. Finally, in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), the Court reaffirmed that prosecutors are among those officials who perform "'special functions' which, because of their similarity to functions that would have been immune when Congress enacted §1983, deserve absolute protection from damages liability." *Id.* at 268-269 (quoting *Butz* v. *Economou*, 438 U.S. 478, 508 (1978)). The Court also reiterated that absolute prosecutorial immunity is not confined to the initiation and prosecution of a criminal case. "We have not retreated * * * from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Buckley*, 509 U.S. at 273; see also *id.* at 280 (Scalia, J., concurring). The types of such actions that occur before the institution of a criminal prosecution and trial include the prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation" to a decision-making tribunal. *Id.* at 273; see also *id.* at 284 (Scalia, J., concurring).

At the same time, *Buckley* held that a prosecutor is not protected by absolute immunity when he undertakes administrative or investigative actions, such as searching for expert corroboration of evidence and making statements to the media. 509 U.S. at 274-278. A prosecutor's role as advocate for the State, *Buckley* explained, generally does not attach "before he has probable cause to have anyone arrested." *Id.* at 274.[7]

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[7] Once accorded absolute immunity, an official retains that immunity regardless of the motives animating her action. *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 354 (1871); see also *Cleavinger*, 474 U.S. at 199-200; *Dorman* v. *Higgins*, 821 F.2d 133, 139 (2d Cir. 1987). Nor does an allegation of error or impropriety in the execution of the function dissipate the protection—otherwise it would be no immunity at all. See *Buckley*, 509 U.S. at 271 (immunity analysis "focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful"); *Mireles* v. *Waco*, 502 U.S. 9, 12-13 (1991). When the conduct is so improper as to exceed any plausible jurisdiction of the official, absolute immunity may not apply. See *Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978). The court of appeals neither found nor suggested that petitioner exceeded the scope of her jurisdiction in executing the certification.

C. A Prosecutor's Obtaining Of An Arrest Warrant In Conjunction With The Filing Of Criminal Charges Is Conduct Undertaken In The Role Of An Advocate For The Government

Whether characterized as the formal institution of a criminal prosecution or as advocatory conduct preparatory to that initiation, a prosecutor's decision to file criminal charges against an individual and to seek an arrest warrant in conjunction with the filing of charges should be accorded absolute immunity. *Burns*, 500 U.S. at 486, 491 (absolute immunity embraces "action[] preliminary to the initiation of a prosecution" when undertaken by a prosecutor "as advocate for the State"); *Imbler*, 424 U.S. at 431 (prosecutor is absolutely immune from civil liability "in initiating a prosecution"). In both instances, the prosecutor appears before a court as an advocate for the government, and her conduct is intimately related to the criminal judicial process.[8]

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[8] With the exception of the court below, the courts of appeals generally have accorded absolute immunity to a prosecutor's request for an arrest warrant in conjunction with the filing of criminal charges. See *Roberts* v. *Kling*, 104 F.3d 316, 320 (10th Cir. 1997) (absolute immunity granted); *Peña* v. *Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (same); *Barr* v. *Abrams*, 810 F.2d 358, 361-362 (2d Cir. 1987) (same); *Joseph* v. *Patterson*, 795 F.2d 549, 555-556 (6th Cir. 1986) (same), cert. denied, 481 U.S. 1023 (1987); cf. *Schrob* v. *Catterson*, 948 F.2d 1402, 1416 (3d Cir. 1991) (seeking seizure warrant in conjunction with filing of *in rem* complaint protected by absolute immunity); *Ehrlich* v. *Giuliani*, 910 F.2d 1220, 1223-1224 (4th Cir. 1990) (seeking order freezing assets in conjunction with indictment accorded absolute immunity). In *Kohl* v. *Casson*, 5 F.3d 1141 (1993), the Eighth Circuit held that "a prosecutor is absolutely immune for appearing before a judicial officer to present evidence in support of an application for an arrest warrant," but enjoys only qualified immunity for participating in the preparation of an affidavit in support of the warrant. *Id.* at 1146-1147.

1. A prosecutor's conduct in obtaining an arrest warrant in conjunction with the filing of criminal charges is functionally indistinguishable from a prosecutor's participation in a probable-cause hearing, which *Burns* held to be protected by absolute immunity. 500 U.S. at 487. In both instances, the prosecutor offers a court evidence documenting the government's legal position that probable cause exists and seeks a judicial determination of probable cause and a warrant predicated on that finding. In particular, the filing of a motion for issuance of an arrest warrant represents the prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation" to the court. *Buckley*, 509 U.S. at 273.

The prosecutor's formal appearance before the court, through the filing of papers and presentation of evidence, cannot be labelled administrative or investigative, and the court of appeals made no effort to do so. The prosecutor speaks as a legal representative of the State and conveys the government's official position that "[it] has probable cause to have [some]one arrested." *Buckley*, 509 U.S. at 274. *Burns* held that the functionally identical conduct "clearly involve[d] the prosecutor's 'role as advocate for the State,' rather than [her] role as 'administrator or investigative officer.'" 500 U.S. at 491 (quoting *Imbler*, 424 U.S. at 430-431 & n.33). There is no basis in law or logic for according a prosecutor absolute immunity for presenting the evidence necessary to establish probable cause the day after an arrest, but not for making the same showing to the same court for the same purpose an hour before an arrest. See *Buckley*, 509 U.S. at 274 & n.5 (prosecutor's belief that probable cause exists weighs in favor of absolute immunity); *Roberts* v. *Kling*, 104 F.3d 316, 319 (10th Cir. 1997) ("Because defendant's actions [of filing a complaint and seeking an arrest warrant] followed a

probable cause determination, they are more closely associated with the judicial process and the prosecutorial function of an advocate for the state.").[9]

2. The prosecutor's submission of a complaint and request for an arrest warrant to a court, like her participation in a probable-cause hearing, "is 'intimately associated with the judicial phase of the criminal process,'" *Burns*, 500 U.S. at 492 (quoting *Imbler*, 424 U.S. at 430), and thus absolute immunity is needed to protect the integrity of the judicial process. The issuance of an arrest warrant based on a judicial finding of probable cause, like the issuance of the search warrant in *Burns*, "is unquestionably a judicial act." *Burns*, 500 U.S. at 492; see also *Forrester* v. *White*, 484 U.S. 219, 227 (1988) ("[T]he informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character.").

Even where a prosecutor's filing of a complaint and related papers is not part of the formal institution of a prosecution (*e.g.*, because no indictment has yet been returned or information filed), that action nevertheless commences a judicial proceeding to restrain the liberty of an individual pending the institution of formal criminal proceedings. The action is thus, at a minimum, closely

[9] The fact that this case involves an arrest warrant, rather than a search warrant (as in *Burns*), makes absolute immunity even more appropriate here. A search warrant necessarily contains an investigatory component, because its purpose is to facilitate the obtaining of evidence. An arrest warrant, by contrast, is more closely tied to the initiation of the actual criminal judicial process, because it provides a means for bringing the individual before the court, and execution of the warrant triggers judicially enforceable protections for the individual. See *Burns*, 500 U.S. at 505-506 (Scalia, J., concurring) (noting that application for search warrant is further removed from judicial process than request for arrest warrant).

interwoven with and predicative to the initiation of a prosecution. See *Buckley*, 509 U.S. at 272; *Marx* v. *Gumbinner*, 855 F.2d 783, 790 (11th Cir. 1988) ("The initial determination of whether such probable cause exists is a part of the larger process of determining whether to initiate a prosecution.").

The prosecutor's filing, moreover, sets in motion the criminal judicial process. The arrest warrant, when executed, brings the subject before the court and subjects him to its immediate authority, without which "the initiation of a prosecution would be futile." *Lerwill* v. *Joslin*, 712 F.2d 435, 438 (10th Cir. 1983); see also *Ehrlich* v. *Giuliani*, 910 F.2d 1220, 1223 (4th Cir. 1990) ("One of the most important duties of a prosecutor pursuing a criminal proceeding is to ensure that defendants * * * are present at trial.").[10]

While *Burns* involved a prosecutor's personal appearance to present argument and evidence to a court, absolute immunity applies with equal force to written evidentiary submissions and arguments. Like statements in the courtroom and the eliciting of testimony, a lawyer's written briefs and pleadings have historically been accorded absolute immunity. See *Imbler*, 424 U.S. at 426 n.23; see also *Butz*, 438 U.S. at 516 n.40. Given the substantial volume of judicial business that is transacted through written submissions by attorneys, it would make little sense to have immunity turn upon the form in which—rather than the function for which—a prosecutor submits arguments and evidence to a court. *Butz*, 438 U.S. at 516 n.40.

[10] The arrest also triggers statutory speedy trial protections. See *State* v. *Greenwood*, 845 P.2d 971 (Wash. 1993); see also 18 U.S.C. 3161(b).

3. Finally, absolute immunity must extend to the prosecutor's preparation and drafting of documents filed in court. In *Buckley*, this Court held that absolute immunity includes the prosecutor's "preparation" of "evidence assembled by the police" to present to a court. 509 U.S. at 273; see also *Peña* v. *Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (absolute immunity includes prosecutor's drafting of complaint). In preparing and drafting pleadings and their supporting documentation, the prosecutor is acting in an advocatory role. In preparing an affidavit, for example, a prosecutor is not acting as an advisor to the police: she is framing and controlling the presentation of evidentiary material to the court, just as she will select and plan the introduction of evidence throughout a criminal trial. To deny absolute immunity because of a prosecutor's involvement in the preparation of documents filed in court would allow a pleading device to circumvent absolute immunity. Plaintiffs would simply attack the preparation, rather than the submission to a court, of a complaint and request for arrest warrant.

D. Absolute Immunity In This Context Is Supported By Common Law Practice

While not necessarily dispositive, common law practice provides useful guidance in discerning what immunities should be recognized under 42 U.S.C. 1983. See, *e.g.*, *Imbler*, 424 U.S. at 417-418; cf. *Anderson* v. *Creighton*, 483 U.S. 635, 644-645 (1987). The precedent on the question presented in this case is not voluminous, in large part because the role of the public prosecutor has evolved substantially in the last century. See *Burns*, 500 U.S. at 499 (Scalia, J., concurring). Nevertheless, the existing case law supports according a prosecutor absolute immunity for obtaining an arrest warrant from a court, especially in conjunction with the filing of criminal

charges. See *Reilly* v. *United States Fidelity & Guaranty Co.*, 15 F.2d 314, 317 (9th Cir. 1926) (suit against district attorney for having plaintiff arrested without probable cause dismissed on grounds of absolute immunity); *Anderson* v. *Manley*, 43 P.2d 39, 40 (Wash. 1935) (prosecutor enjoys absolute immunity for criminal complaint issued on basis of false search warrant); *Kittler* v. *Kelsch*, 216 N.W. 898, 899-905 (N.D. 1927) (prosecutor enjoys absolute immunity from claim for false arrest based on filing of complaint that led to arrest warrant) (cited in *Imbler*, 424 U.S. at 422 n.19); cf. *Watts* v. *Gerking*, 228 P. 135, 138 (Or. 1924) (prosecutor enjoys absolute immunity from suit alleging malicious filing of complaint and procurement of search warrant) (cited in *Imbler*, 424 U.S. at 422 n.19); but see *Leong Yau* v. *Carden*, 23 Haw. 362, 364 (1916) (prosecutor denied absolute immunity for making false representations that resulted in issuance of arrest warrant) (cited but not followed in *Imbler*, 424 U.S. at 422 n.19).

Relatedly, a prosecutor's presentation of allegedly false evidence to a grand jury, which resulted in indictment and arrest, was accorded absolute immunity from suit in *Yaselli* v. *Goff*, 12 F.2d 396, 406 (2d Cir. 1926), aff'd mem., 275 U.S. 503 (1927). Cf. *Griffith* v. *Slinkard*, 44 N.E. 1001, 1002 (Ind. 1896) (prosecutor enjoys absolute immunity for adding plaintiff's name to indictment, which led to plaintiff's arrest) (cited in *Imbler*, 424 U.S. at 421).[11]

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[11] On the other hand, when a prosecutor instigated an arrest extrajudicially, common law courts were less willing to grant absolute immunity. See, *e.g.*, *Schneider* v. *Shepherd*, 158 N.W. 182, 184 (Mich. 1916). In addition, private attorneys who procured arrest warrants were also denied immunity. See, *e.g.*, *Teal* v. *Fissel*, 28 F. 351, 352 (E.D. Pa. 1886) (noting difference between public prosecutors and private attorneys); *Peck* v. *Chouteau*, 91 Mo. 138, 150 (1886); *Fischer* v.

Other cases described those same prosecutorial functions as "quasi-judicial" actions, which is a category of conduct to which the common law accorded absolute immunity. See *Smith* v. *Parman*, 165 P. 663, 663 (Kan. 1917) ("[T]he important matter of determining what prosecutions shall be instituted is committed in a considerable degree to his sound judgment, and in the exercise of that function he acts at least in a quasi judicial capacity"; "We think the reason for granting immunity to judges and grand jurors applies with practically equal force to a public prosecutor in his relations to actions to punish infractions of the law.") (cited in *Imbler*, 424 U.S. at 422 n.19).[12] Indeed, in *Imbler*, this Court noted that "[c]ourts that have extended the same [absolute] immunity to the prosecutor have sometimes remarked on the fact that all three officials—judge, grand juror, and prosecutor—exercise a discretionary judgment on the basis of evidence presented to them." 424 U.S. at 423 n.20. The prosecutorial judgment to file a complaint and seek an arrest warrant on the basis of the investigative record compiled

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Langbein, 103 N.Y. 84, 89 (1886); *Burnap* v. *Marsh*, 13 Ill. 535, 538 (1852).

[12] See also *Pearson* v. *Reed*, 44 P.2d 592, 596-597 (Cal. Ct. App. 1935) ("A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused—exactly the same question that is presented to a court or jury upon trial.") (cited in *Imbler*, 424 U.S. at 424); M.L. Newell, *A Treatise on the Law of False Imprisonment and the Abuse of Legal Process* § 68, at 166 (1892) ("when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a direction in its nature judicial, the function is termed *quasi*-judicial"; a quasi-judicial officer "cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided that judgment may be").

by the police is just that—a discretionary judgment on the basis of evidence presented to the prosecutor.

Finally, the common law granted absolute immunity (at least from defamation suits) to an attorney's filing of pleadings and advocatory documents with a court. See *Buckley*, 509 U.S. at 270; *Imbler*, 424 U.S. at 426 n.23; *Hoar* v. *Wood*, 44 Mass. 193, 197-198 (1841) ("[I]t is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions."); see also 1 T. Cooley, *Law of Torts* § 153 (4th ed. 1932); 1 F. Harper & F. James, *The Law of Torts* § 5.22 (1956). This "traditional defamation immunity is sufficient to provide a historical basis for absolute § 1983 immunity." *Burns*, 500 U.S. at 501 (Scalia, J., concurring).

E. The Policies Underlying Absolute Immunity Support Its Application In This Context

Recognition of absolute immunity for a prosecutor's request for an arrest warrant, when sought in conjunction with the filing of criminal charges, is necessary to protect the proper functioning of the criminal justice system. Like the determination to pursue a prosecution, a prosecutor's decision to file criminal charges and to bring the individual before the court by means of an arrest warrant is, by its nature, a highly discretionary judgment, often made under serious constraints of time, information, and concerns about public safety. See *Imbler*, 424 U.S. at 425. Those judgments may be difficult to defend and document years later when scrutinized through the 20/20 hindsight of a civil damages trial. *Id.* at 425-426 ("Defending these decisions, often years after they were made, could impose

unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.").

Prosecutors, moreover, serve a unique function within the adversarial judicial system:

> The prosecuting attorney is a very responsible officer, selected by the people, and vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. * * * He is expected to be impartial in abstaining from prosecuting as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned.

Engle v. *Chipman*, 16 N.W. 886, 887 (Mich. 1883); see also *Berger* v. *United States*, 295 U.S. 78, 88 (1935) (United States Attorney is a "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer"). A prosecutor cannot properly fulfill those duties if the risk of personal damages liability weighs in the balance with every filing of a complaint or information and motion for issuance of an arrest warrant. *Imbler*, 424 U.S. at 424-425.

In *Imbler*, this Court recognized the importance of insulating from suit a prosecutor's decision to go forward with a prosecution. 424 U.S. at 424-429. It is equally important that a prosecutor's decision to withdraw charges after an arrest, and thereby to protect those subsequently deemed innocent, be accorded protection from civil liability. See *Appeal of Nicely*, 18 A. 737, 738 (Pa. 1889) ("[I]t is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes."); see also *United States* v. *Lovasco*, 431 U.S. 783, 794-795 & n.15 (1977). Withholding absolute immunity from the decision to charge and arrest, however, would leave a decision to withdraw prosecution vulnerable, and

would allow plaintiffs to challenge a decision to prosecute simply by restyling their complaints as attacks on the initial decision to file a complaint and seek an arrest warrant. See *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves."). Because "pretrial court appearances by the prosecutor"—whether in person or through the filing of pleadings—"in support of taking criminal action against a suspect present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor," absolute immunity is warranted. *Burns*, 500 U.S. at 492.

Absolute immunity does not leave arrested individuals unprotected. The arrest triggers judicial procedures that protect against abuse, including "one of the most important checks, the judicial process" itself. *Burns*, 500 U.S. at 496. In the federal context, the Speedy Trial Act requires that an indictment or information be filed within 30 days of an arrest on a complaint. 18 U.S.C. 3161(b); see also Fed. R. Crim. P. 5(c) (right to a preliminary hearing within a specified time period when arrested on a complaint); *State* v. *Greenwood*, 845 P.2d 971 (Wash. 1993). In addition, the complaint and other documents filed with the court in this case were each signed by the prosecutor (J.A. 13-20), making her subject to the court's inherent power to punish false representations by members of the bar. See *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). The certification in support of the arrest warrant was filed under oath, making the prosecutor subject to perjury charges for intentionally false statements. Wash. Rev. Code §§ 9A.72.020, 9A.72.030 (1996). Prosecutors who intentionally violate an individual's constitutional rights are

subject to prosecution under 18 U.S.C. 242; cf. *United States* v. *Lanier*, 117 S. Ct. 1219 (1997). Finally, as this Court recognized in *Imbler*, prosecutors face unparalleled scrutiny and review by their professional peers. 424 U.S. at 429. Accordingly, the imposition of personal damages liability is not the sole means available for ensuring that prosecutors act within constitutional limits when filing or approving complaints and motions for the issuance of arrest warrants. See *Imbler*, 424 U.S. at 429.

F. Affording Absolute Immunity In This Case Would Be Consistent With *Malley* v. *Briggs*

1. Affording absolute immunity to prosecutors for procuring arrest warrants in conjunction with the filing of criminal charges is consistent with this Court's decision in *Malley* v. *Briggs*, 475 U.S. 335 (1986). *Malley* held that police officers do not enjoy absolute immunity when they request an arrest warrant from a court. The court below concluded that it would be inequitable to afford prosecutors absolute immunity for "the same task." Pet. App. 6a. That conclusion, however, misunderstands how the functional analysis underlying immunity doctrine operates.

Functional analysis does not stop with a description of the conduct at issue. If it did, the questioning of crime witnesses would always enjoy only qualified immunity, regardless of whether the questioning was done by a police officer investigating a crime, a prosecutor preparing for trial, or a judge in court. Cf. *Buckley*, 509 U.S. at 273 (absolute immunity protects prosecutor's preparation for the presentation of evidence at trial); *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967) (absolute immunity for judges for acts committed within their jurisdiction). Likewise, the prosecutor's application for a search warrant in *Burns* would have been denied absolute immunity, because the

same conduct performed by a police officer warrants only qualified immunity. Compare *Burns*, 500 U.S. at 491, with *Burns*, 500 U.S. at 505 n.2 (Scalia, J., concurring), and *Malley*, 475 U.S. at 340-345. The court of appeals' observation that both prosecutors and police officers may request arrest warrants thus should not have terminated the absolute immunity inquiry. See *Roberts*, 104 F.3d at 321 ("[T]he acts themselves are not the focus of the functional approach * * *. Instead we examine the function a defendant's acts serve."); see also *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part) ("Two actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions.").

The function of an official's conduct must be assessed in light of its purpose and role within the overall context of the criminal process. While the official's title is not dispositive, *Buckley*, 509 U.S. at 269, the court of appeals erred in concluding that an actor's professional responsibilities are altogether irrelevant. The role of a governmental actor is relevant to assessing the purpose and context of the challenged conduct. Indeed, immunity doctrine evolved from an acknowledgment that "some officials perform 'special functions,'" *id.* at 268, and so the immunity inquiry begins by "examin[ing] the nature of the functions with which a particular official or class of officials has been lawfully entrusted." *Forrester*, 484 U.S. at 224; cf. *Wyatt* v. *Cole*, 504 U.S. 158, 163-169 (1992) (private defendants generally enjoy no immunity from suit). For that reason, *Malley* expressly warned against incautious comparisons of the activities of prosecutors and police officers. 475 U.S. at 342-343; *Ehrlich*, 910 F.2d at 1224.

A prosecutor's request for an arrest warrant in conjunction with the filing of criminal charges performs a

function that is separate and distinct from the police officer's request in *Malley*. The former, unlike the latter, reflects the official legal judgment of the attorney for the government that an individual is to be charged with a crime, and it is closely intertwined with or preparatory to the formal initiation of a prosecution. In this case, for example, the prosecutor filed a motion for issuance of an arrest warrant along with her filing of the information, which under Washington law represents the actual initiation of a criminal prosecution. Initiating a prosecution is a function confined to prosecutors; a police officer's application for an arrest warrant could not accomplish that function without the prosecutor's concurrence that a prosecution would serve the public interest. Cf. *Lovasco*, 431 U.S. at 794. Nor does a police officer, in seeking an arrest warrant, purport to speak as an advocate or as an officer of the court. The police officer's procurement of an arrest warrant therefore is "further removed from the judicial phase of criminal proceedings" than the prosecutor's. *Malley*, 475 U.S. at 342.

Furthermore, although there is a common law predicate for according a prosecutor absolute immunity for procuring arrest warrants, see pages 18-21, *supra*, no such tradition existed for police officers. *Malley*, 475 U.S. at 342; *Butz*, 438 U.S. at 496 ("[T]he common law has never granted police officers an absolute and unqualified immunity.") (quoting *Pierson*, 386 U.S. at 555).[13]

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[13] In addition, as the Court noted in *Malley*, 475 U.S. at 343 n.5:

> The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct. As we observed in *Imbler*, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 U.S., at 429 (footnote omitted). The absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.

2. Respondent contends (Br. in Opp. 7-28) that *Malley* controls because petitioner acted, not as a prosecutor, but as a complaining witness when she signed the certification for the determination of probable cause. *Malley* denied the police officer absolute immunity in part because "complaining witnesses were not absolutely immune at common law." 475 U.S. at 340. For two reasons, however, this case does not appear to present the question whether absolute immunity would attach if a prosecutor acted solely as a complaining witness.

First, petitioner did not purport to offer firsthand knowledge of the facts contained in the certification. She informed the court at the opening of her certification that the recitation of facts was based on her "familiar[ity] with the police report and investigation." J.A. 19; cf. *Malley*, 475 U.S. at 337-338. Petitioner, in other words, did not present herself as a percipient witness with firsthand knowledge of the underlying facts or in the traditional role of a complaining witness.[14] Rather, in this setting, the certification appears most analogous to an attorney's proffer of evidence to a court of the facts developed by the police in their investigation, combined with the legal judgment that the proffered (certified) evidence demonstrated probable cause to charge and arrest respondent for purposes of bringing him under the control of the court and initiating a prosecution. See *Gerstein*, 420 U.S. at 120 (probable cause may be shown through informal modes of

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[14] Her position is thus different from that of a police officer serving as a complaining witness based on his personal involvement in or responsibility for the investigation that led to the charges. Petitioner did not profess to speak as an investigator or person otherwise involved in the investigation.

proof); see also Wash. Crim. R. 2.2 (court does not require that complaining witnesses personally appear in support of warrant application, although court may call them or others if it chooses). Had petitioner made such a proffer when acting as an attorney for the government in a probable-cause or bail hearing, she no doubt would have enjoyed absolute immunity for her statements. See *Burns*, 500 U.S. at 487-491; see also note 4, *supra*. Neither this Court's precedents nor the nature of functional analysis justifies granting absolute immunity to a prosecutor's oral statements to a court, while denying such protection simply because the identical material was conveyed to the same court for the same purpose in a written certification under oath.

Second, the documents filed by petitioner were presented as a package to the court as a formal means of instituting the actual criminal prosecution of respondent. Because that function as a whole should be accorded absolute immunity, the process should not be dissected paper by paper, with immunity granted or denied based on the content of individual documents. Cf. *Schrob* v. *Catterson*, 948 F.2d 1402, 1416 (3d Cir. 1991) (in forfeiture cases, "the seizure warrant is an integral part of the forfeiture complaint and the decisions to file the complaint and seek the warrant should be considered as one" for purposes of absolute immunity).

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
PATRICIA A. MILLETT
Assistant to the Solicitor General
BARBARA L. HERWIG
PETER R. MAIER
Attorneys

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